Argued by
H. RICHARD UVILLER

IN THE

Supreme Court of the United States

October Term, 1963

No. 167

SIDNEY J. UNGAR,
Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York,
Appellee.

BRIEF FOR THE APPELLEE

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Statement

The appellant, an attorney, was adjudged in criminal contempt by the appellee, then a judge of the Court of General Sessions of New York County. The contempt was committed by the appellant when, appearing as a prosecution witness in the trial of Hulan E. Jack, he shouted, in the presence and hearing of the court and jury "in a loud, angry, disorderly, contemptuous, and insolent tone, directly tending to interrupt the proceedings of the court and to impair the respect due to the authority of the court:

"'I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The court is suppressing the evidence.'" (Order to Show Cause, R 90-91).

In the early part of 1960, Hulan E. Jack, then Borough President of Manhattan, was charged in a four count indictment with conspiracy and violation of conflict of interest provisions of the New York City Charter. Sidney J. Ungar, the appellant, was named a co-conspirator. In substance the indictment accused Jack of conspiring with Ungar and others to obstruct justice by concealing Ungar's payments to a contractor for renovation of Jack's residence, and of accepting gifts from Ungar, who was interested in matters involving payments from the City Treasury and whose business activities were subject to Jack's official actions. Two trials ensued, the first resulting in jury disagreement and the second in the conviction of Jack.

Ungar, who had been granted immunity in the grand jury, was called as a witness by the People at both trials. A long-time friend of the defendant (R 12-13), he was uncooperative, unresponsive and disrespectful, evading proper questions, volunteering irrelevant matter, asserting that he had no knowledge or recollection of pertinent facts which were clearly known to him, and cavilling about the form of certain questions. (Numerous instances of such conduct are set forth in the Order to Show Cause, R 70-91). This conduct necessitated repeated interruptions of the trial, constant rereading of questions and frequent admonitions by the court to the witness. After reiterated warn-

ings in open court and at the bench, the judge recessed the trial, retired to the robing room, and, out of the presence of the jury, again admonished the witness:

"The Court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the Court, and you were the one who created those incidents, in my judgment.

"I told you then, at the first trial, that you were creating a very serious problem for the Court and that, as a lawyer, I assumed you knew what the problem was.

"I should like very much to avoid any repetition of what happened the last time.

"We each have a function to perform here. Whether it is an agreeable function or a disagreeable function is of no concern.

"Now I have said to you up to now on a number of occasions that you should confine your answers to the questions, not to volunteer, not to get into any dispute or discussions, not to try to indicate what you think the question should be or how you should answer it.

"This is a trial before the jury, not before the Court alone. As a judge, I must rule in accordance with my understanding of the law, which I am doing.

"I hope you understand what I am saying, Mr. Ungar. Do you?

• • •

"The Witness: I have got to understand the question, in order to answer it. I can't answer a question

merely if your Honor says, 'Answer it,' if it doesn't make sense to me or if it's creating a false impression—

"The Court: Will you desist. You see, it's none of your business whether it creates in your judgment a false impression or not. The defendant is represented here by a lawyer, and the People are represented by a lawyer. It is for them to conduct this litigation, and not you.

"Now I am only going to make one more statement and we will return to the courtroom.

"There is a rule of law that every man is presumed to intend the natural consequences of his act. I am going to hold you to that standard." (R 84-85)

Nevertheless, Ungar maintained his previous course of conduct. Asked what Jack had said to him when he had told Jack that there was a full-scale investigation before the grand jury, Ungar replied, "that's only a small part of what I told him" (R 54). When the court insisted on a responsive answer, Ungar requested a recess, claiming that he was being "pressured and coerced and intimidated into testifying" and that he was being "badgered by the court and by the District Attorney" (R 55). When the court granted a recess of several minutes, but refused Ungar permission to leave the witness stand, he stated that he was "a bundle of nerves", that he "must have a recess", and that he could not testify (R 56). The court replied that he was not testifying, that no one was questioning him, and that the recess would continue for a few minutes longer (R 56). This, however, did not permit Ungar to avoid answering the unpleasant question that was pending and when, after a further interval of silence, the court directed the district attorney to proceed, Ungar shouted:

> "I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence" (R 56-57).

The court immediately informed the appellant that he was "not only contemptuous but disorderly and insolent" (R 57). After a luncheon recess, Ungar resumed his testimony (R 61-62). When the appellant was excused he was directed by the court to keep himself available for future action concerning his contemptuous conduct:

> "The Court: Now Mr. Witness, with regard to your conduct as a witness in this case, the Court is deferring action until the completion of this trial. Please hold yourself available at that time."

However, the court wisely refrained from holding the witness in contempt at that time, lest such action in the midst of the trial prejudice the case against the defendant. Two days after the termination of the trial, the court had an order to show cause served on the appellant, answerable in five days.

Thus, having deferred action till the termination of the trial, and having further given the appellant five days written notice of the charges against him, the court substantially augmented his opportunity to prepare and present a defense beyond the ordinary rights accruing when a contempt is committed in the immediate view and presence of the court, as here.

At the outset of the hearing, an adjournment was requested on the ground that counsel whom appellant had retained was engaged in another matter (R 94). The court granted a recess of several hours to permit counsel himself to argue for the adjournment (R 95-96). However, when counsel appeared, he informed the court that at the time he was retained by the appellant he was already engaged in the other matter and that he had told the appellant that he could not represent him unless he obtained an adjournment (R 97). The court declined to grant an adjournment, stating that the appellant, knowing his conduct had been considered contemptuous and having been informed of the imminency of the contempt proceeding, should not have retained an attorney who was not free to represent him (R 99-100). After introducing certain documentary evidence himself, the court gave the appellant an opportunity to show cause why he should not be held in contempt (R 100-101). Declaring that he did not wish anything he said to be taken as participation by him in the hearing on the merits (R. 101), the appellant made a statement addressed to the court's authority to hold him in contempt in a summary proceeding and to its denial of an adjournment (R 101-105). It was only after he had been adjudged in contempt that he belatedly requested an adjournment to produce evidence (R 110-111).

Summary of Argument

1. The appellant's loud invective, hurled in the face of a sitting court, constituted a wilfully contemptuous denigration of the dignity of the court; and the finding of fact to such effect is not reviewable by this Court.

2. The vitally necessary, if extraordinary, power of a sitting court to punish immediately and summarily a contempt committed in its very view and presence, has been repeatedly held and considered to comport with constitutional requirements of due process. The reasoning behind this uniform rule is unimpeachable.

3. The power of summary adjudication, reasonably deferred, is not lost; nor does its exercise after the event trammel constitutional prerogatives. Exigencies of a trial situation may indeed, as here, counsel cautious postponement to protect the paramount right of the defendant to a fair trial. The acquisition by the contemnor of benefits attendant upon deferred adjudication does not entitle him to greater rights.

4. The exercise of the power of summary adjudication, instantaneous or deferred, rests upon the court's personal knowledge of the event. Judicial detachment must be presumed, unless the contrary is evident, and the contemnor is constitutionally entitled neither to another judge or cross-examination of witnesses. Apart from the absence of constitutional barrier to the multiple roles of a judge in a summary contempt proceeding, judicial prejudice was no factor in the present case since the affront was undisputed and unjustified, and was contumacious on its face.

5. The procedure here chosen accords with the holding in *Sacher* v. *United States*, 343 U. S. 1 (1952), which is still controlling authority.

6. The appellant having failed to avail himself of adequate opportunity to obtain available counsel—a right which was not due him—the court did not violate the contemnor's constitutional protection by denying further adjournment of the proceedings. The appellant was accorded a real opportunity to explain or justify his conduct, and enjoyed due process of law.

7. The appellant's claim that the New York delineation of contempt is void for vagueness, voiced for the first time to this Court, should not be heard. However, the standard is explicit and definite.

POINT I

The fully warranted finding of contempt is not here subject to review.

The appellant was held in contempt by the judge who witnessed his contemptuous conduct. The judge introduced evidence (R 100-101), stated his reasons for holding appellant in contempt (R 105-108), and set forth the circumstances of the offense in a mandate of commitment (R 38-40). The conviction was affirmed by the Appellate Division of the New York Supreme Court and by the New York Court of Appeals. A factual finding by state courts is not reviewable by this Court unless there is a complete lack of evidence to support it. *Thompson* v. *Louisville*, 362

U. S. 199 (1960). In the instant case the holding was amply supported by the evidence.

Throughout his testimony at the trial of Hulan Jack, the appellant was a reluctant, sometimes openly hostile, and frequently evasive witness. His increasingly disrespectful conduct towards the court culminated in his shouting at the court, in a loud, disorderly and contemptuous tone, "I am being coerced and intimidated and badgered. The court is suppressing the evidence" (R 56-57). That an unwarranted attack of this nature on the integrity of the court is contemptuous *per se* cannot be seriously disputed.

Cf. Fisher v. *Pace*, 336 U. S. 155 (1949);
Waldman v. *Churchill*, 262 N. Y. 247 (1938);
MacInnes v. *United States*, 191 F. 2d 157 (9th Cir. 1951);
Hyman Goldman Plumbing and Heating Corp. v. *Nesbitt*, 244 App. Div. 311 (1st Dept. 1935).

Indeed, so serious was the accusation hurled at the court that it might be deemed slander, since the suppression of evidence constitutes a crime under New York law (New York Penal Law, §814). In fact, in his brief to the New York Court of Appeals, the appellant conceded that his words, if spoken wilfully and deliberately, constituted a prima facie contempt. The intentional character of his conduct is demonstrated by the numerous other instances of testimonial recalcitrance in the face of repeated admonitions by the court. For, as noted, and set forth in the mandate, this was not an isolated instance of contumacious behavior but the climax of a continuous course of conduct by which the appellant deliberately intended to

defy the dignity and authority of the court to avoid giving testimony harmful to his friend.

Moreover, as stated by this Court in *Fisher* v. *Pace*, 336 U. S. 155, 160 (1949):

> "In a case of this type the transcript of the record cannot convey to us the complete picture of the court-room scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge."

In the instant case, the judge noted in the mandate of commitment that the utterance for which the appellant was cited was voiced in a boisterous and aggressive tone, and "with studied insolence" (R 39).

Thus the appellant's contention before this Court that the facts fail to substantiate his conviction is neither weighable nor weighty.

POINT II

The New York law under which appellant was held in contempt of court accords with the requirements of due process.

Introduction

Under New York law, contempt committed during the court's sitting, in its immediate view and presence, is punishable summarily. As under federal law, the judge presiding may punish the contempt immediately, without holding a hearing, based on his own knowledge of the fact, without

affording counsel to the accused, and without giving the contemnor an opportunity to cross-examine witnesses. Under the procedure sanctioned by the instant decision, the court may also defer the adjudication until the termination of the trial or a reasonable time thereafter, where an immediate adjudication might adversely affect the case on trial and the contemnor would not be harmed by the postponement. In this alternative procedure, the contemnor is nevertheless informed at once that his conduct is considered contemptuous and that the court intends to take action against him. As soon as they can be drawn, written charges are served on the accused, who is given five days notice of the proceedings and an opportunity to present a defense. In contrast to the federal law, which leaves the punishment to the discretion of the court, the maximum penalty that may be imposed in a summary contempt adjudication in New York—which is not even deemed a criminal trial—is 30 days imprisonment and a fine.

The appellant challenges on constitutional grounds the power of the state of New York to permit its courts to exercise the traditional enforcement of order and respect by such a deferred summary contempt procedure.

A. The power to punish summarily for contempt committed in the presence of the court does not violate due process.

Contempt committed in the presence of the court is punishable summarily under the laws of New York (Judiciary Law of New York, Section 751), under federal law (Rule 42 (a) Fed. R. Crim. Proc.), and under the laws of most jurisdictions. The necessity for the exercise of such summary

power has long been recognized and its use was very early sanctioned by this Court. In *Ex parte Terry*, 128 U. S. 289, 313 (1888), the Court stated:

> "We have seen that it is settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them."

The constitutionality of summary contempt adjudication is implicit in the numerous decisions of this Court affirming such convictions or reversing them on other grounds. The contention that it is violative of due process was expressly rejected in *Fisher* v. *Pace*, 336 U. S. 155, 159-160 (1949), where the Court stated:

> "This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law."

Mr. Justice Jackson, in *Sacher* v. *United States*, 343 U. S. 1, 8 (1952), endorsed summary procedures with the cogent observation that:

> "* * * the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for its being made summary."

And, in a concurring opinion in *Green* v. *United States*, 365 U. S. 165 (1958), Justice Frankfurter stated: "* * * The most authoritative student of the history of contempt of court has impressively shown that 'from the reign of Edward I, it was established that the Court had the power to punish summarily contempt committed in the actual view of the Court' " (365 U. S. 165, 189). He pointed out that in at least two cases in the Supreme Court "not to mention the vast mass of decisions in the lower federal courts, the power to punish summarily has been accepted without question" and listed fifty-three Justices of the Court as having sustained its exercise (356 U. S. 165, 190-2).

The appellant's historical discussion of dark origins of the power of summary contempt, and his exposition on the colonial antipathy to British traditions, have little bearing on the constitutional question. The issue is more properly judged by the present day necessity to enforce respect for courts and preserve their proper functioning. Today, ours is a society of growing complexity, subject to the clash of increasingly urgent needs. The courts stand at the nave of community conflict. The just resolution of civil strife by the orderly process of law was never more vital to national health than it is today. And without respect, there can be no administration of law; indeed, it is probably the only alternative to force. By the very nature of its work, the trial court is the meeting place of hostile, opposed, and often intense emotions. For the most part,

these stresses do not disrupt the quiet dignity of the forum. But it is clear that the judge must have at hand effective emergency measures to assure the continuing operation of the tribunal. Responsible and restrained use of such power, subject to dispassionate review, can not be said to offend the basic tenets of ordered liberty which are, rather, preserved thereby.

B. The Fourteenth Amendment does not compel instantaneous exercise of the summary contempt power.

It is not disputed, and indeed could not be, that the conduct for which the appellant was cited occurred in the immediate view and presence not only of the court, but the jury, the public, and the press represented in the courtroom. It is equally manifest that the shouted vituperation, climaxing a persistent pattern of disobedience, constituted behavior disrupting and directly discrediting the actual conduct of a judicial proceeding. Consequently the court clearly had the power to punish the appellant instantly and summarily. The appellant, *pro se*, admitted as much during the action against him (R 101). The peculiar feature of the present case is the court's reservation of the exercise of its acknowledged power to a future time. It is claimed that, somehow, the power evaporated during the short delay in its application. So, the appellant argues, necessary and firmly established judicial power is irrevocably lost simply by the passage of time. This despite the fact that the deferment of action was required to insure the fairness of the trial in progress and, far from suffering harm by reason of the postponement, the contemnor gained benefits not normally due him. The trial court, in explaining the reason for the procedure adopted, stated:

"It was only out of a deep consideration for the rights of a defendant that this man was not adjudged and punished for contempt on November 25, 1960. When in the presence and view of the Court he committed the acts set forth in the order to show cause.

"I did not want to take any action during the trial, at any time, which would in the slightest degree even tend to diminish the rights of a defendant to a fair trial.

"I feared that if I took action against this witness, it would be possible that the action would unduly influence a juror. So action was deferred until the completion of that trial" (R 98-99).

The posture of the trial at the time of the appellant's contumacious outburst was such that immediate punitive action by the court, although warranted, would have been unwise. An adjudication of contempt on the spot might indeed have adversely affected the defendant's rights. Ungar, a named co-conspirator of Jack's, had professed close friendship with the defendant on trial. The trial was a highly sensitive one owing to the high office of the defendant. Under these circumstances, had the jury learned of judicial action against Ungar, it might have been interpreted as hostility toward the defendant's cause. Even if held in the jury's absence, there would have been real danger, in this highly publicized trial, that a juror would have heard of it indirectly. But more important, such action by the court might have transformed the bias of the witness from favoring the defendant to favoring the prosecutor. His future testimony, delivered under a jail sentence imposed or impending, might well have reflected an effort to cull favor by damaging the target of the prose-

cution beyond deserts. And this witness, Ungar, was in a position to severely damage the defendant if he chose to. Moreover, a similar bias might have been introduced in future witnesses who may have feared that testimony hostile to the prosecution might subject them too to judicial displeasure. Thus, the wisdom of the court's election of minimal measures at the critical moment in the trial in order to enforce proper conduct, while reserving exercise of full sanctions to obviate risk to the defendant, is apparent.

The second important aspect of the chosen procedure is the enhanced opportunity accorded to the appellant to prepare an explanation or justification for his courtroom behavior which might have excused or mitigated the offense. He was informed immediately that the court deemed his conduct, prima facie, insolent and contemptuous. He was warned at the conclusion of his testimony three days later, to remain available for action relating to his performance as a witness until the conclusion of the trial. Ten days later written charges were served in an order to show cause requiring his presence five days thereafter. By virtue of the deferred procedure, therefore, the appellant gained seventeen days to reflect, obtain medical records or witnesses, and seek the counsel of an attorney. In addition, he faced the court on carefully written and detailed allegations, not only of the specific contemptuous outburst but of the basis for the court's belief that his attitude was contumacious when the impeachment of the court was uttered. He had in hand not only the charge but the fullest "bill of particulars" with five days allowed for study and preparation of a defense. None of this was required; all inured to his real benefit.

Yet the appellant argues that the very bestowal of undeserved benefits diminished the power of the court. The crucial moment of obloquy hurled in the face of the court having passed, he contends, the Fourteenth Amendment required total abandonment of summary procedures. For such procedure, he claims, deprived him of an adjudication by an impartial tribunal and of the right to cross-examine.

In so arguing, he distorts the essence of the power of summary adjudication. Such power does not rest on temporal considerations. Rather, the unusual power derives from the unusual feature of having occurred in the presence and view of a sitting court. It is inherent in the nature of such contempt that the court offended witnessed the offense. The court has the power to punish without the ordinary plenary procedures for the finding of fact because such findings simply need not be made where the fact-finder has personal knowledge of the occurrence [*Douglas* v. *Adel*, 269 N. Y. 144, 146-7 (1935)]. An opportunity to explain must be accorded [*In re Rotwein*, 291 N. Y. 116 (1943)], but no more. Viewed in this light, it is clear that the basis for summary power—knowledge of the fact—is not erased by the lapse of a short interval of time. And to defer the exercise of the power is not to destroy it.

In addition to the New York Court of Appeals, the highest court of Michigan, the highest court of Pennsylvania, the appellate courts of California, the Circuit Court of Appeals for the Second Circuit, and the Circuit Court of Appeals for the Eighth Circuit, have either held or expressed the view that the exercise of summary contempt power may be deferred.

In re Henry, 119 N. W. 2d 671 (Mich. 1963);
Appeal of Levine, 95 A. 2d 222 (Pa. 1953);
Ex parte Grossman, 293 P. 368 (Cal. App. 1930);
United States v. *Panico*, 308 F. 2d 125 (2d Cir. 1962);
United States v. *Galante*, 298 F. 2d 72 (2d Cir. 1962);
United States v. *Sacher*, 182 F. 2d 416 (2d Cir. 1950);
Nilva v. *United States*, 228 F. 2d 134, 135 (8th Cir. 1955); aff'd 352 U. S. 385 (1956).

With respect to the claim that a different judge should have been called upon to adjudicate the issue, it may be acknowledged that such a procedure might be advisable, as indicated by the Court of Appeals in affirming the present case. But it is not required by due process. Even the federal rules only require the attention of a different judge where the alleged contempt occurred out of the view and presence of the court offended. Absent a showing of an embroilment with a judge so personal in nature as to destroy judicial impartiality [*e.g.*, *Offut* v. *United States*, 348 U. S. 11 (1954)], it cannot be assumed that a sitting judge, insulted by a witness, is incapable of detached judgment. In the present case, the court went to some lengths to state that he felt no personal animosity but was bound to vindicate the dignity of the court in which he presided (R 106). And there is no reason to doubt the sincerity of his statement. The contempt involved no heated wrangling or intemperate personal exchanges, but a single shouted defiance. The role of a judge, contrary to the appellant's contention (brief, pp. 27-8), necessarily imports dispassion. An insult to the court, therefore, can not be considered the personal

affront which invites retaliation. And the judge witnessing the contempt to his court can not be deemed disqualified to deal with it. It is a normal attribute of contempt in the view of a sitting court that the judge proffers charges, is himself the prime witness, fact-finder, and pronounces sentence. Nor can he be said to be constitutionally disqualified in any of these roles.

In re Murchison, 349 U. S. 133 (1955) and *In re Oliver*, 333 U. S. 257, cited by the appellant for the proposition that it is a denial of due process for the contemnor to be held in contempt by the same judge who witnessed his misconduct, involved not contempt of court, but contempt before a grand jury. Although the Court held in *In re Murchison* that the judge who constituted the one-man grand jury could not preside at the contempt hearing, it specifically noted that this did not involve "the long exercised power of courts summarily to punish certain conduct occurring in open court," 349 U. S. 133, 134.

Beyond these considerations, on the present record, possible prejudice on the part of the court was not a factor. There was no issue on the fact. The utterance was made, it was the culmination of a stubborn course of defiantly uncooperative behavior, no excuse or explanation was offered, and the appellant's utterance was clearly contemptuous. Thus, there was absolutely no necessity to present the evidence to another judge since the result would, of necessity, have been identical.

This reasoning on the nature of contempt punishable summarily, and the derivation of the court's power to sit in multiple roles, is fully supported by the decision of this

Court in *Sacher* v. *United States*, 343 U. S. 1 (1952). There, in a situation similar in vital respects, Mr. Justice Jackson, writing for the majority, stated:

> "The rule in question contemplates that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial, so it gives him power to do so summarily. But the petitioners here contend that the Rule not only permits but requires its instant exercise, so that once the emergency has been survived punishment may no longer be summary but can only be administered by the alternative method allowed by Rule 42 (b). We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense but, refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.
>
> "Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise. Forthwith judgment is not required by the text of the Rule. Still less is such construction appropriate as a safeguard against abuse of power. If the conduct of these lawyers warranteed immediate summary punishment on dozens of occasions, no possible prejudice to them can result from delaying it until the end of the trial if the circumstances permit such delay. The overriding considera-

tion is the integrity and efficiency of the trial process, and if the judge deems immediate action inexpedient he should be allowed discretion to follow the procedure taken on this case. • • •

"• • • If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.

"We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his position delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power." (343 U. S. 1, 8-9).

Since the Court neither held the federal courts' exercise of summary contempt power at the termination of the trial unconstitutional, nor even prohibited it under its supervisory authority over federal courts, but on the contrary, recognized that the exigencies of the trial may require it, similar action by State courts cannot be deemed to violate the Fourteenth Amendment.

The appellant would distinguish *Sacher* on the ground that there the adjudication of contempt was made immediately upon the conclusion of the trial, whereas here, it was made several days after its completion. This is the classic distinction without a difference. If the exercise of the power could be deferred to the conclusion of the trial it could be deferred a few days beyond, particularly for

the purpose of furnishing written specifications. Certainly, the added interval is of absolutely no constitutional significance.

The appellant also contends that *Sacher* was overruled by *Offut* v. *United States*, 348 U. S. 11 (1954), and by *Panico* v. *United States*, — U. S. —, 84 S. Ct. 19 (1963). Neither the reasoning nor the language of *Offut* or *Panico* lends support to this claim. Justice Frankfurter, writing for the majority in *Offut*, expressly disavowed such an intention when he began his discussion of the applicable law with the statement, "We shall not retrace the ground so recently covered in the *Sacher* case * * *" 348 U. S. 11, 13. The decision in *Offut* is based on a special finding that there was a "continuous wrangle" between the court and counsel and that the trial court's adjudication of contempt was infused with personal animosity. Indeed, the trial judge's personal antagonism toward counsel was such that the Court of Appeals reduced the sentence imposed on counsel on the ground that the contempt was provoked by the judge. In the instant case the trial court's action was not motivated by counter-aggression. Indeed, the judge indicated that he did not consider the appellant's contemptuous conduct as a personal affront but as an obstruction to the due administration of justice (R 106), and the New York Court of Appeals held "that appellant's contemptuous remarks were not a personal attack upon the trial judge" (R 166). Moreover, this Court specifically stated in *Offut* that its decision was based on its "supervisory authority over the administration of criminal justice in the federal courts" 348 U. S. 11, 13, and not on constitutional grounds.

Furthermore, *In re Murchison*, 349 U. S. 133, 134 (1955), decided after *Offut*, cited the *Sacher* decision, firmly indicating its survival as viable authority.

In *Panico* v. *United States*, *supra*, the defendant was adjudged guilty of criminal contempt in a summary proceeding and sentenced to fifteen months imprisonment. He contended that at the time of the conduct for which he was held in contempt he was suffering from mental illness. Shortly after his conviction he was found to be schizophrenic by a court-appointed psychiatrist. This Court reversed on the ground that he was entitled to a hearing on his claim of insanity. Since that involved a question of fact not within the court's knowledge, a summary adjudication of contempt would have been equally improper had it been made immediately upon the occurrence of the contemptuous conduct. Consequently, this holding could have had no impact on *Sacher*, for the Court nowhere intimated that deferring the summary adjudiciation of contempt till the end of the trial was improper. In the instant case the court gave the defendant an opportunity to show why he should not be held in contempt (R 101), but he declined to do so (R 101). It was only after he was convicted that he requested time to present medical evidence that he was under emotional stress at the time of the occurrence (R 110).

C. The appellant was not denied due process by the court's refusal to grant an adjournment on the ground that counsel was otherwise engaged.

This Court is bound by the determination of the New York Court of Appeals that the nature of the adjudication was summary, though not instantaneous (R 3-4, 154-156).

In such abbreviated procedure—which cannot be properly considered a criminal trial—an accused enjoys no right to counsel, and the opportunity for preparation is limited [*Nilva* v. *United States*, 382 U. S. 385 (1957); *People* v. *Cirillo*, 11 N. Y. 2d 51 (1962)]. While the appellant here was given considerable advance notice, with the concomitant opportunity to consult or retain counsel, he did not acquire thereby rights inappropriate to the nature of the proceeding. The court was not bound to remedy his failure to avail himself of the ample opportunity granted. Although warned on November 25th and again on November 28th and served with papers on Thursday, December 8th, the appellant did not consult an attorney until Saturday, December 10th. And then, of all the attorneys in New York, the one he chose to represent him was one he knew would be engaged on the return date (R 97).

There being no right to counsel, the court was not bound to allow an adjournment for the convenience of the appellant's lawyer, nor for the appellant to select another. The disposition of a request for an adjournment to obtain counsel or to give counsel time to prepare lies within the sound discretion of the court. *Avery* v. *Alabama*, 308 U. S. 444 (1940); *Torres* v. *United States*, 270 F. 2d 252 (9th Cir. 1959); *United States* v. *Arlen*, 252 F. 2d 491 (2d Cir. 1958); *People* v. *Jackson*, 111 N. Y. 362 (1888). Compare *Nilva* v. *United States*, 352 U. S. 385, p. 395, Note 10 in accompanying text (1956). That discretion was not abused here.

In addition, it must be remembered that the appellant was an experienced attorney, and the proceeding merely called for an explanation of his own conduct, a subject no

one was better qualified to deal with than he himself. Yet, when the court called upon the appellant to show cause why he should not be punished for contempt, he replied that he did not wish to participate in the proceedings (R 101, 105). Nevertheless he spoke at some length (R 101-105), and it was certainly not for lack of opportunity that he failed to present an excuse for his vilification of the robe.

POINT III

The validity of Section 750 of the New York Judiciary Law, not having been raised in the state courts, is not properly before this Court.

Here, for the first time, the appellant challenges Section 750 of the New York Judiciary Law as vague. This contention was neither presented to nor passed on by the New York courts, where the appellant's only constitutional point was the alleged deprivation of procedural due process. The specific arguments, as set forth by the Court of Appeals in the amended remittitur (R 164), consisted of alleged abrogations of due process by:

> (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge "personally attacked."

Nowhere, prior to his Statement of Jurisdiction to this Court, has the appellant argued that Section 750 was void for vagueness. It is fundamental that a federal question

not raised in the state courts is not reviewable by this Court [*Dorrance* v. *Penn*, 287 U. S. 660 (1932); Rules 15(d), 16(b), Supreme Court Rules]. Thus appellant's present contention concerning Section 750 is not properly before the Court.

It is clear, however, that the Section does not lack specificity. To constitute contempt, the conduct must not only be disorderly, contemptuous or insolent, but it must also directly tend to interrupt the proceedings of the court or impair the respect due it. The measure is, if anything, more explicit than the comparable federal law which provides that a court may punish for contempt such conduct as "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U. S. C. §401. The statutes of most states contain equally comprehensive provisions, and at least nineteen states have statutes that are almost identical to Section 750 of the New York Judiciary Law:

Ala. Code Re-compiled, Title 13, §2 (1958);
Ark. State Ann., Title 34, §901 (1947);
Cal. Code of Civ. Proc., §1209;
Conn. Gen. Stat., Title 51, §33 (1958);
Idaho Code, Title 7, §601 (1947);
Iowa Code Ann., §665.2 (1946);
Mich. Stat. Ann., §27A.1701 (1961);
Minn. Stat. Ann., §588.01 (1945);
Mo. Rev. Stat., §476.110 (1959);
Rev. Code of Mont., §93-9801 (1947);
Neb. Rev. Stat., Ch. 25, §2121 (1943);
Nev. Rev. Stat., §22.010;
No. Car. Gen. Stat., Ch. 5, §1 (1953);

No. Dak. Century Code Ann., §33-10-01 (1959);
Okla. Stat., Title 21, §565 (1961);
Ore. Rev. Stat., §33.010 (1961);
Utah Code Ann., Title 78, §32.3 (1955);
West's Wisc. Stat. Ann., §256.03 (1957);
Wyo. Stat., Title 1, §668 (1957).

The New York statute provides an ascertainable standard of guilt. It has been construed and applied in innumerable instances [see, *e.g.*, *Matter of Rotwein*, 291 N. Y. 116 (1943); *Matter of Douglas* v. *Adel*, 269 N. Y. 144 (1935); *Waldman* v. *Churchill*, 262 N. Y. 247 (1933)]. It would indeed tax the most exacting draftsman to formulate a more descriptive criterion of conduct which breaches good order and undermines the respect which must clothe the proceedings of our vital democratic institutions of justice.

Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,

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